

INDEX

	Page
Opinions below.....	1
Jurisdiction.....	1
Question presented.....	2
Contract provision involved.....	2
Statement.....	3
Argument.....	6
Conclusion.....	12

CITATIONS

Cases:

<i>Britain Steamship Co. v. King (The Matiana)</i> , [1921] A. C. 90.....	10
<i>Crist v. United States War Shipping Administration</i> , 163 F. (2d) 145, certiorari denied, 332 U. S. 852.....	9, 10
<i>Harrisons, Ltd. v. Shipping Controller</i> , [1921] 1 K. B. 122.....	10
<i>SS Larchgrove v. King</i> , 1 Ll. L. Rep. 498, 36 T. L. R. 108 (K. B. 1919).....	10
<i>Leyland Shipping Co., Ltd. v. Norwich Union, Ltd.</i> (1917), 1 K. B. 873.....	9
<i>Queen Insurance Company v. Globe & Rutgers Fire Insurance Company</i> , 278 Fed. 770; 282 Fed. 976; 263 U. S. 487.....	9, 10
<i>Standard Oil Co. v. United States</i> , 267 U. S. 76.....	11

Statutes:

Act of June 29, 1936, c. 858, 49 Stat. 1985, as amended by the Act of June 29, 1940, c. 447, 54 Stat. 689, the Act of March 6, 1942, c. 154, 56 Stat. 140, and the Act of April 11, 1942, c. 240, 56 Stat. 214, 46 U. S. C. 1128g.....	3
Sec. 224, as added by the Act of June 29, 1940.....	8
Merchant Marine Act, 1936, as amended by the Act of March 24, 1943, c. 26, 57 Stat. 45, 47, and the Act of April 24, 1944, c. 178, 58 Stat. 216, 46 U. S. C. 1128-1128h.....	3, 12
Act of March 24, 1943, c. 26, Sec. 2 (a), 57 Stat. 45, 47....	8
Suits in Admiralty Act, 46 U. S. C. 745.....	12

Miscellaneous:

Arnould, <i>Marine Insurance</i> (12th Ed., 1939), Sec. 905.....	9
Executive Order 9054, February 7, 1942, 7 F. R. 837.....	3

In the Supreme Court of the United States

OCTOBER TERM, 1948

No. 171

MARY LOUISE REINOLD, PETITIONER

v.

UNITED STATES OF AMERICA

**ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED
STATES CIRCUIT COURT OF APPEALS FOR THE SECOND
CIRCUIT**

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the District Court of the United States for the Southern District of New York (R. 57a-62a) is reported at 72 F. Supp. 92. The opinion of the United States Circuit Court of Appeals for the Second Circuit (R. 68-73) is reported at 167 F. (2d) 556.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered on April 29, 1948 (R. 74). The petition for a writ of certiorari was filed on July 22,

1948. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended.

QUESTION PRESENTED

Whether the court below erred in declining to hold that the death of Backus, the chief officer of the MV *Baltic*, caused solely by the drunken act of an off-duty member of the armed guard crew on board the ship in Montevideo Harbor, was caused by a "restraint" or "warlike operation" within the meaning of the war risk policy applicable to members of the ship's crew.

CONTRACT PROVISION INVOLVED

The coverage portion of the war risk insurance policy here involved is as follows (R. 44a):

Against loss of life and bodily injury to the master, officers, and crew (including within the term "crew" licensed and unlicensed seamen, including radio operators and cadets) directly occasioned by capture, seizure, destruction by men of war, piracy, takings at sea, arrests, restraints and detentions and other warlike operations (including collisions in convoy but with reservation of subrogation rights under owner's marine policies or against other colliding vessel, in the event it is determined that such collision is attributable to marine causes) and acts of kings, princes, and peoples in prosecution of hostilities or in the application of sanctions under international agreements, whether before or after

declaration of war and whether by a belligerent or otherwise, including factions engaged in civil war, revolution, rebellion or insurrection, and including the risks of aerial bombardment, floating or stationary mines and stray or derelict torpedoes.

STATEMENT

This suit was instituted by the filing of a libel against the United States on June 26, 1944, to recover the proceeds (\$5,000) of a policy of war risk insurance, issued by the War Shipping Administration as agent for the United States,¹ on the life of Ernest F. Backus as an officer of the MV Baltic, a vessel owned and operated by the Panama Transport Company (R. 1a, 37a, 39a, 40a). Petitioner is the beneficiary named by Backus. The sole question presented is whether the death of Backus was caused by a "restraint" or "warlike

¹ The insurance was issued pursuant to the provisions of the Act of June 29, 1936, c. 858, 49 Stat. 1985, as amended by the Act of June 29, 1940, c. 447, 54 Stat. 689, the Act of March 6, 1942, c. 154, 56 Stat. 140, and the Act of April 11, 1942, c. 240, 56 Stat. 214. The insurance provisions of the Merchant Marine Act, 1936, were later further amended by the Act of March 24, 1943, c. 26, 57 Stat. 47, and the Act of April 24, 1944, c. 178, 58 Stat. 216. 46 U. S. C. 1128-1128h. By Executive Order No. 9054, February 7, 1942, 7 F. R. 837, the duties and authority of the Maritime Commission with respect to marine and war risk insurance under the Merchant Marine Act were lodged in the Administrator of the War Shipping Administration, and this transfer of function was confirmed by the Act of April 11, 1942, c. 240, 56 Stat. 217, 46 U. S. C. 1128g.

operation" within the coverage of the policy. The pertinent facts are as follows:

On June 29, 1942, the MV *Baltic* was in Montevideo Harbor (R. 15a). The vessel had sailed from Baltimore, Maryland and, putting into Miami, Florida, for repairs, had been there joined by a United States Navy armed guard crew (R. 5a-6a).² The ship was in Montevideo to deliver a cargo of crude oil picked up in Ecuador and consigned to a branch of the Uruguayan Government (R. 39a). The cargo was moved under a time charter arrangement with the War Shipping Administration and was in the course of being discharged at the time of the death of Backus (R. 9a, 39a).

The death of Backus took place on the night of June 29, 1942, while the *Baltic* lay in Montevideo Harbor (R. 15a-16a). The master of the ship and the officer in charge of the armed guard were both ashore (R. 13a, 15a, 17a). Backus, as chief officer of the ship, was in authority (R. 16a). One Rosborough, a member of the armed guard crew, went below, after being relieved of duty,³ and be-

² The guns manned by this crew had been on the MV *Baltic* from the outset of this voyage and had been manned by merchant seamen gunners prior to the time the vessel put into Miami (R. 6a).

³ A member of the armed guard crew was kept on guard duty aboard the vessel in port for the security of the Navy equipment (R. 21a). On the night here involved, Rosborough had been on duty during the early evening and had been relieved by another member of the armed guard crew, Platt (R. 21a, 35a, 36a).

came extremely drunk and belligerent (R. 8a, 9a, 10a, 11a, 13a, 18a, 25a, 28a, 31a, 32a). At that time and during the ensuing events, Rosborough made threats against Backus, Captain Ray, the master of the vessel, and Lieutenant Ferguson, the officer in charge of the armed guard crew (R. 8a, 9a, 10a, 12a, 16a, 27a, 33a). In the course of being forcibly put to bed several times, Rosborough fought with Backus and with Pendarvis, a member of the armed guard crew (R. 25a, 28a, 32a, 33a). Rosborough did not stay in bed but arose and went about seeking, but not obtaining, a knife (R. 26a). Subsequently, at approximately a quarter after midnight, he suddenly appeared at the starboard machine gun and began to fire the gun (R. 11a, 26a). Backus, Williams (merchant crew), and Phillips (armed guard crew) approached Rosborough from various directions to overpower him and get him away from the gun (R. 11a, 26a-27a, 33a). In the course of this effort, Rosborough fired another burst from the gun which killed Backus (R. 26a-27a, 29a-30a).

The case was tried on deposition and on the record of the court martial proceeding against Rosborough (R. 4a, 13a-14a). The district judge found “* * * that the proximate cause of * * * death was the restraint exercised by the U. S. Navy while said vessel [*Baltic*] was engaged in warlike operations” (R. 61a). The district judge stated that Backus, as chief officer, “had no authority or control over the gun crew or the

guns and ammunition" and that this was "a restraint exercised by the U. S. Navy" (R. 59a-60a). The district court further held that the presence of the armed guard crew on board the vessel for protective purposes was "unquestionably a warlike operation" (R. 60a). Judgment was accordingly awarded in favor of petitioner (R. 64a).

The court below reversed the district court decree and remanded the case with directions to dismiss the libel. The court below noted that the death of Backus had not been caused by a "restraint" or "warlike operation" but was "immediately due to a drunken brawl and not to anything normally occurring as the result of the presence on the vessel of an Armed Guard or within the reasonable contemplation of the parties to the policy." (R. 70-71, 73.) The court held that no covered war risk was the proximate cause of the death of Backus (R. 73).

ARGUMENT

Petitioner contends that war risk policy coverage exists herein on two grounds, advanced "separately or together" (Pet. 4). First, petitioner urges that the *Baltic* was under "restraint" or engaged in "warlike operations," apparently for all purposes, solely by virtue of the fact that a protective armed guard crew had been placed on board the vessel (Pet. 4, 12-17). Running through this contention are suggestions by petitioner that

some general Congressional purpose lay behind the issuance of war risk policies whereby blanket coverage, without regard to the nature of the peril involved, was afforded to officers and members of the crews of merchant ships (Pet. 4, 13, 15-16). Petitioner's second contention is that the death of Backus was caused by a "restraint" within the meaning of the policy as the result of the instructions for merchant vessels issued by the United States in connection with placing armed guard crews on board such vessels (Pet. 4, 17-19). In this connection, petitioner argues that the authority and responsibility of the master and officers of the *Baltic* over internal management of the ship and the safety of all persons on board stemmed solely from such instructions insofar as members of the armed guard crew were concerned (Pet. 2, 4, 18).

We submit that there is no merit to petitioner's contentions. Controlling doctrine herein was not "originated" by the court below (Pet. 4) but, on the contrary, is contained in a well considered and traditional body of case law applicable to the precise policy in terms as that here involved. Such doctrine was properly applied by the court below in disposing of the narrow issue presented by the unique facts of this case.

1. The statutory authority to write war risk insurance is specifically conditioned on an administrative finding that such insurance "can-

not * * * be obtained on reasonable terms and conditions from companies authorized to do insurance business in a State of the United States." Section 224 of the Act of June 29, 1936, 49 Stat. 1985, as added by the Act of June 29, 1940, 54 Stat. 689. Upon such finding, the War Shipping Administration⁴ was authorized "* * * to provide such insurance on a basis corresponding to the war risk insurance protection supplied, prior to such determination, for such personnel by companies authorized to do business in a State of the United States. * * *"⁵ Section 224, *supra*.

There is thus nothing in the statutory foundation for the war risk policy here involved to support petitioner's suggestion that the policy issued should be construed in a manner sharply different from the construction given to nongovernmental war risk policies. On the contrary, it seems clear that the writing of governmental war risk insurance on a basis other than that used commercially was not authorized by Congress.

⁴ The authority to write insurance was transferred from the Maritime Commission to the War Shipping Administration on February 7, 1942. Fn. 1, *supra*, p. 3.

⁵ For the purpose of this case, the statutory authority limited the writing of Government insurance to insurance covering "risks of war". Section 224, *supra*. The authority to write insurance was amended to authorize the inclusion of marine risks in war risk insurance policies in respect to masters, officers and crews by Section 2 (a) of the Act of March 24, 1943, c. 26, 57 Stat. 45, 47, an amendment which in general eliminated the need for determining the question of war risk *vel non* as to policy coverage thereafter.

Pursuant to the authorization given, the War Shipping Administration issued policies which employed the classic and familiar formulae for delimiting war-risk coverage.* See contract provisions here involved, *supra*, pp. 2-3. The legal effect of the language thus employed, insofar as the question here presented is concerned, is well established. A "restraint" within the meaning of the policy requires a showing that the peril which necessarily occasioned the loss involved some act properly done in the exercise of governmental or sovereign powers. *Crist v. United States War Shipping Administration*, 163 F. (2d) 145 (C. C. A. 3), certiorari denied 332 U. S. 852, and cases discussed therein; *Leyland Shipping Co., Ltd. v. Norwich Union, Ltd.* (1917), 1 K. B. 873 (Court of Appeal); Arnould, *Marine Insurance* (12th Ed., 1939), Section 905. The same careful construction has been given to other phases of war-risk coverage. "Warlike operations" is not construed to cover all acts done generally in the course of a war; rather, the inquiry is whether the specific peril which occasioned the loss was a "warlike operation." *Queen Insurance Company v. Globe & Rutgers Fire Insurance Company*, 263 U. S. 487; and see opinion in that case of the Second Circuit Court of Appeals in 282 Fed. 976, at pp. 978-979; and opinion of Judge Hough in 278 Fed. 770, at p. 782. In other words, the question on a claim of

* War-risk coverage is, of course, not cumulative. Its area is separate from, and in addition to, marine coverage.

war-risk coverage is not the existence of some general condition of preparedness or protection but whether a specific war risk, as distinguished from other peril, occasioned the loss involved; the dispositive issue is a determination of proximate cause. *Crist v. United States War Shipping Administration, supra*; *Queen Insurance Company v. Globe & Rutgers Fire Insurance Company, supra*; *Britain Steamship Co. v. King (The Matiana)*, [1921] A. C. 99, 109-110, 118-119, 129, 135-136; *Harrisons, Ltd. v. Shipping Controller*, [1921] 1 K. B. 122, 135; *S. S. Larchgrove v. King*, 1 Ll. L. Rep. 498, 36 T. L. R. 108 (K. B. 1919).

Applying these principles, it is obvious that no "restraint," "warlike operation," or other war peril occasioned the death of Backus. His death was solely and immediately caused by Rosborough's drunken conduct, fully described in the statement of facts, *supra*, pp. 4-5. And it seems too clear to require argument that Rosborough's conduct was entirely independent of the governmental purpose in placing the armed guard crew on board the Baltic for the protection of the vessel and cannot be considered as a circumstance which constituted a peril within the coverage of the policy.

Nor can a different result be reached by petitioner by emphasizing the instructions issued to the Baltic (and to all merchant ships given the protection of an armed guard crew) in connection with the jurisdiction of the armed guard and its

officer. As recognized by the court below, a court well versed in traditional admiralty matters, these instructions did not create authority and responsibility in the Baltic's officers as to matters of internal safety (R. 70-71). On the contrary, a fair reading of the instructions shows that their obvious intendment was to preserve the preexisting and traditional authority of the Baltic's ranking officer in this regard and to carve from that authority certain areas in matters of protection and military decision. The instructions specifically stated: "In accordance with law, the master commands the vessel and is charged with her safe navigation and the safety of all persons on board." (R. 53a, 71.) Moreover, members of the armed guard crew were specifically "subjected to the orders of the master of the merchant vessel as to matters pertaining to internal organization" (R. 52a, 70). In the main, the balance of the instructions carefully map out the area, in connection with actual protection and defense, of armed guard crew autonomy (R. 51a-56a).⁷ We submit that petitioner's argument that these instructions created a duty in Backus, as chief officer, to control and

⁷ Cases such as *Standard Oil Co. v. United States*, 267 U. S. 76, relied on by petitioner (Pet. 18), are accordingly not in point. Such cases involve situations where a ship is taken from the owner's control. In the *Standard Oil* case, the vessel was actually boarded by a British naval party which was in full control of the ship at the time the loss occurred. The instant case, under a proper reading of the instructions, presents exactly the opposite situation.

disarm Rosborough is invalid. It is clear, as shown above, that the instructions preserved rather than created such authority and duty.*

2. No matter of general importance is here presented which warrants further review. The determination of war risk coverage in cases of this type turns on an inquiry of fact, and the circumstances of the instant case are unique. Only a few cases, dependent upon widely varying facts, which involve crew war risk life and injury insurance policies, are in litigation, and it is unlikely that many more will arise since the applicable two-year statute of limitations in which to make claim under such policies has long since expired.*

CONCLUSION

The decision of the court below is clearly correct. There is no conflict of decision and further

* In any event, petitioner's argument in this respect seems to be based on the false assumption that the actions of Backus, as chief officer, sprang only from his relationship under the instructions to members of the armed guard crew. It seems obvious that Backus was under a duty to members of his own crew, apart from the instructions, which would have dictated the same course of action which he actually pursued.

* Suits against the United States to recover on war risk policies are required by the Merchant Marine Act (46 U. S. C. 1128d) to be brought under the Suits in Admiralty Act, which contains a two-year statute of limitations (46 U. S. C. 745). The first form of seamen's war risk policy, on which the petitioner sues, required that "claim" be made by the payee "within two years after the date of accident"; the Second Seamen's War Risk Policy, adopted March 19, 1943, requires, in general, that suit be brought within two years from the time the insurance becomes payable.

review is not warranted. It is respectfully submitted that the petition for a writ of certiorari should be denied.

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AUGUST 1948.